IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1251

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL
Petitioners,

v.

REDERIAKTIEBOLAGET TRANSATLANTIC
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the First Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent opposes the petition for a writ of certiorari. The Court below has not departed from the "accepted and usual course of judicial proceedings;" its judgment does not conflict with any decision in another circuit; and the case presents no issue of public importance which was not settled in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968)—hereinafter, *VW*—on which rests the decision of which petitioners seek review.

COUNTERSTATEMENT OF THE CASE

We accept petitioners' statement except that:

(a) The Commission-approved agreement among the several Boston terminals did not authorize "the fixing of rates and charges for wharfage, dockage, free time, wharf demurrage, *and all terminal facilities and services*" (Petition, 4; our italics). It covered only–

> " . . . the following subject matters and all services, facilities, rates and charges *incidental thereto*:– wharfage, dockage, free time, wharf demurrage, usage charges, passenger charges, water, electricity." (App., Vol. I, 61; our italics.)

(b) Petitioners incorrectly assert that their agreement does not show "who will be assessed the charges." (Petition, 11.) The charges in dispute cover "wharf demurrage" –a term uniformly and repeatedly defined by the Commission as a "charge against cargo" (App. Vol. I, 85), and similarly defined by the terminals in every edition of their tariff (App. Vol. I, 107, 108, 130, 131, 132, 133). Even when the same charge was renamed "strike storage," it was defined as a charge "against cargo" (App. Vol. I, 109).

When a provision was eventually added to provide that "strike storage . . . will be assessed to the vessel" (App. Vol. I, 135), the addition reversed the meaning of the agreement as the Commission had approved it. An approved agreement for assessing against cargo an industry-fixed price for a service to the cargo became an unapproved agreement for assessing against *carriers* the same industry-fixed price for the same service to cargo. Such changes have uniformly been held by the Commission and the courts to require §15 approval. *American Export Isbrandtsen Lines v. Federal Maritime Commission*, 334 F.2d 185 (9th Cir., 1964); *Persian Gulf Outward Freight Conference v. Federal Maritime Commission*, 375 F.2d 335 (D.C. Cir., 1967); *Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association*, 183 F.Supp. 910 (E.D. Pa., 1960).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S *VW* DECISION.

This Court held in *VW* that an agreement among persons subject to the Shipping Act having the effect of allocating or reallocating liability required Commission approval under § 15 of the Act, 46 U.S.C. § 814 (Petition, 15). The Court rejected in *VW* the contention advanced by the terminals here that such a re-allocation was exempt from approval as "routine" or "de minimis" (390 U.S. at 277-78). The Court below could not have ruled otherwise in this case without flouting the *VW* mandate. The District Court had succeeded in reaching a contrary result only by ignoring *VW* (App. Vol. I, 147-150).

We see no conflict between the decision below and that of the District of Columbia Circuit in *Empire State Highway Transportation Ass'n., Inc. v. Federal Maritime Board*, 291 F.2d 336 (1961), cert. denied 368 U.S. 931. *Empire State* involved an ordinary rate increase of a type long held "routine" and therefore covered by the Commission's approval of general rate-making activity. The case did not hold that permission for industry-wide fixing of prices payable by one class of customers authorized transfer of the charges thus fixed to another class. In any event, *Empire State* can have no relevance here. The Court of Appeals followed this Court's 1968 decision in *VW*, which differs from *Empire State* as the terminals read it. We assume that a 1968 decision of this Court commands precedence over a conflicting 1961 decision of any other court.

II. THE DECISION HERE USURPS NO POWER VESTED IN THE MARITIME COMMISSION.

The terminals contend (Petition, 7-8) that the judgment below constitutes a collateral (and forbidden) attack on a Commission decision which could be reviewed only on direct petition to a court of appeals under 28 U.S.C. § 2341-44—the Judicial Review Act. The contention is unfounded:

(a) As the Court of Appeals noted, the respondent (Transatlantic) was not a party to the Commission proceedings.

(b) Participation in the Commission case by Transatlantic's agent, Furness Withy, does not change matters. Transatlantic was admitted to intervention before the District Court because Furness Withy lacked substantial incentive to protect, and had in fact insufficiently protected Transatlantic's interest (App. Vol. I, 12-13).

(c) The Commission's decision (App. Vol. I, 65-79) was not a "final order" of the type committed to the exclusive reviewing jurisdiction of courts of appeals by 28 U.S.C. § 2342. The District Court in the present case permitted the *defendants* in that court to seek a Commission ruling on the "lawfulness and reasonableness" of demurrage charges for which the terminals were suing (App. Vol. I, 24). The defendants, as complainants before the Commission, requested such a ruling (App. Vol. I, 66). The Commission held (App. Vol. I, 70-72) that the charges were not unlawful or unreasonable. The ruling resulted in no determination of or exoneration from liability; it merely purported to state the Commission's view on two issues out of a larger number tendered in the District Court (App. Vol. I, 15). The Commission did not purport to decide —and could not decide—such other issues.

A Commission order is final only if it "imposes an obligation, denies a right, or fixes some legal relationship which may cause irreparable injury." *Lee v. Federal Maritime Board*, 284 F.2d 577, 580 (9th Cir., 1960). The order in question had none of these consequences.

III. THE DECISION BELOW LACKS SIGNIFICANT REGULATORY CONSEQUENCES.

The terminals (Petition, 9) claim to see an important issue in the question whether "a change in incidence" of a charge under an approved price-fixing agreement requires a new agreement and new approval. That question was answered in *VW*.

If the terminals wish in the future to assess carriers rather than cargo for wharf demurrage (under whatever name), they can easily test their right to do so by amending their agreement and asking the Commission to approve the amendment. The Court below held merely that the Commission's decision "did not bind non-parties to charges sought to be imposed for services rendered prior thereto."

CONCLUSION

The petition should be denied.

Respectfully submitted,

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